ORAL ARGUMENT'S BIG CHALLENGE: FIELDING QUESTIONS FROM THE COURT

Jason Vail*

A friend of mine was on deck for oral argument in the Florida Supreme Court when the chief justice called the case before hers, and the lawyers mustered at the counsel tables. As my friend tells the story, the appellant's attorney approached the podium, shuffled his papers, raised his face to the panel—and fainted.

Oral arguments to appellate courts can be less intimidating and stressful if you keep in mind a few tips about dealing with one aspect of the adventure: fielding questions from judges.

First we need to put the lawyer's job in perspective. Litigators often think their role is to be Paladins, champions for the client. However, judges see lawyers as helpers. As Supreme Court Justice Byron White once said, "[W]e treat lawyers as a resource rather than as orators who should be heard out according to their own desires."[1] Any lawyer who fails in this helper role will not serve either the court or the client.

Judges ask questions for a variety of reasons, but mainly because they really want to know the answer. Frequently, the judge is troubled about some aspect of your argument. So, questions are a window into the judge's mind.[2] If, in your answer, you can address the judge's concern, you may win the point. Justice Antonin Scalia has said oral argument gives "counsel his or her best shot at meeting my major difficulty with

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* Appellate Attorney, Florida Attorney General's Office.

1. Stephen M. Shapiro, *Questions, Answers, and Prepared Remarks*, LITIGATION, Spring 1989, at 33, 33 (quoting Byron White, *The Work of the Supreme Court: A Nuts and Bolts Description*, N.Y. STATE B.J., Oct. 1982, at 346, 383); *see also* Alex Kozinski, *Tread Carefully When Approaching the Bench*, NAT'L L.J., Oct. 27, 1997, at A19: "A question from the bench should be grasped with an outstretched hand."

2. William F. Jung, *Effective Appellate Advocacy: Lessons Learned at the U.S. Supreme Court*, FLA. B.J., July/Aug. 1986, at 17, 18.

that side of the case. 'Here's what's preventing me from going along with you. If you can explain why that's wrong, you have me.'"[3]

Senior Federal Circuit Judge Daniel M. Friedman recognizes that questions from the bench are an advocate's "hardest test. Many lawyers dislike questions, on the theory that they interfere with a prepared presentation. Lawyers should welcome questions. It is the one opportunity to find out what is troubling the judges, and to answer them."[4] Indeed, "[f]rom the judges' perspective, answering their questions is the whole purpose of oral argument."[5]

The need to respond effectively to judicial questions can't be overstated. It can spell the difference between a win and a loss. Federal Circuit Judge Frank M. Coffin likens oral argument, which includes a lawyer's effective response to questions, as "the first stage of the conferencing among the judges. How often I have begun argument with a clear idea of the strength or weakness of the decision being appealed, only to realize from a colleague's questioning that there was much, much more to the case than met my eye."[6]

Former United States Deputy Solicitor General Stephen Shapiro sees judicial questions falling into seven broad categories:[7]

- *Questions going to the heart of the case.* These are the kind, noted by Justice Scalia, that address the central issues. Your answer may not persuade the questioner, but it may reach other judges on an appellate panel. "If the questioning judge has an erroneous view of the record, the governing law, or of your submission, this kind of question affords a golden opportunity to set the matter straight," Shapiro says.[8]

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3. Shapiro, *supra* note 1, at 33.

4. Daniel M. Friedman, *Winning on Appeal, in* APPELLATE PRACTICE MANUAL 129, 139 (Priscilla Anne Schwab ed., 1992).

5. Nicholas Herman, *Practice Pointers for Appellate Oral Argument: Staying Flexible to Persuade the Court*, TRIAL, Oct. 1992, at 64, 66.

6. FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING AND JUDGING 133 (1994).

7. Shapiro, *supra* note 1, at 35-36.

8. *Id.*

‣ *Background questions.* These questions generally inquire about some important fact or, in an appeal, the conclusion reached by the trial court.[9]

‣ *Fencing or debating questions.* Sometimes the judge heads down an intellectually interesting, but not particularly relevant, rabbit trail. Shapiro says, "You cannot, of course, cut off such debates, even if the issue seems tangential. By the same token, however, you need to avoid becoming bogged down in intellectually stimulating digressions . . . ."[10] This is especially critical in appellate arguments, where your time is strictly rationed.

‣ *Humorous questions or observations.* Don't let humor, either friendly or jabbing, sidetrack you. "Enjoy the remark and get back to business," Shapiro says.[11]

‣ *Irrelevant questions.* The lawyer, who knows—or ought to know—the subject better than the judge, may be irritated by questions that don't seem important to the issues. Don't let your irritation show, however. Be patient, give a polite answer, and move on, Shapiro advises.[12]

‣ *Hostile questions.* Some judges will come at you in a tough, often unfriendly way. This isn't necessarily because they dislike you or your client (although that's possible). Usually it happens because the judge is philosophically at odds with your position.[13]

‣ *Friendly questions.* These are the soft pitches judges throw lawyers to enable them to cast their positions in a favorable light. Sometimes the judge will even restate your position for you. Such questions from an appellate judge can mean that she is using the lawyer as a mouthpiece in a debate with her colleagues on the panel.[14]

Watch out for hypothetical questions. Judges are concerned about the effect of their rulings on other cases, so they will frequently test your proposed rule by exploring its application to different facts. Senior Judge Ruggero Aldisert of the Third

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9. *Id.* at 36.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

Circuit Court of Appeals warns lawyers never to respond, "[T]hose facts are not before the court.... That's a different case."[15] He writes judges know that, but they also realize "that there comes a point when the extension of a legitimate principle brings it into conflict with another, equally legitimate, and the court must decide where along the line the axe must fall."[16]

Another judicial trick question is to ask for a concession. Sometimes you can strengthen your overall position—and enhance your personal credibility—by jettisoning a weak point. But be wary of questions like these. The judge may be trying to back you into a corner.

The best way to deal with questions is to formulate responses before the argument. Before any oral argument, you should review the briefs and anticipate questions. Your opponent's brief often will suggest questions the court may raise. So read the opposition's papers carefully, note potential questions and weak points, and prepare responses beforehand.

It is often helpful to give the papers to another lawyer who is not as familiar with the issues as you are and have that person toss questions at you. This doesn't have to become a formal moot court, but it serves the same purpose. Your friends will not come up with all possible questions, but the exercise will prepare you for the unexpected. Think of plausible answers. Rehearse the answers in your head, or speak to the bathroom mirror.

In court, you should expect your argument to take the form of a conversation rather than a monologue or speech.[17] Some courts are still "cold," with the judges sitting on that high bench like a gallery of stones. But that should be the rare court these days. Today, most courts are "hot," prepared on the facts and the issues and loaded with questions. Don't be surprised if judges start launching questions even before you open your mouth.

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15. RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS & ORAL ARGUMENT 332 (NITA rev. ed. 1996).

16. *Id.*

17. Steven F. Molo & Paul P. Biebel, Jr., *Preparing for Oral Argument*, *in* APPELLATE PRACTICE MANUAL, *supra* note 4, at 244, 251.

Judge Aldisert gives these guidelines for answering judges' questions:[18]

‣ *Listen to the question.* In court, as in conversation, there is a human tendency to hear only a part of what someone else says. In court, nervousness exaggerates that tendency. Force yourself to listen closely.[19]

‣ *Understand the question before you answer it.* Don't fire back a response from the hip. Take a second to mull over the question and to formulate your answer.[20]

‣ *Answer the question directly.* Judges have sensitive antennae. They can spot an evasive answer no matter how artfully camouflaged. And they hate it.[21] Also, generally don't put off an answer until later. Answer promptly, even if the judge pops the issue out of your preferred order. Then steer the conversation back to your main points.[22]

‣ *Make your answers clear and concise.* If the question calls for a short response—like a simple yes or no—give the short answer.[23]

‣ *Don't bluff.* Don't be afraid to tell the court you do not know the answer.[24] This is hard to do. It is embarrassing not to know something the judge considers important. In November 1995 I watched an oral argument before the United States Supreme Court. The issue was whether the government could seize as the instrument of a crime the wife's undivided half interest in a car used by her husband (without the wife's knowledge or consent) to solicit a prostitute. Only seconds into the argument, Justice Sandra Day O'Connor asked the wife's lawyer to identify the nature of the petitioner's property interest. The lawyer couldn't tell her, and he tried to wing it.[25] In this

18. Aldisert, *supra* note 15, at 328-31.

19. *Id.* at 328.

20. *Id.*

21. *See also* Friedman, *supra* note 4, at 140.

22. Aldisert, *supra* note 15, at 328-29.

23. *Id.* at 329.

24. *Id.* at 330; *see also* Robert L. Stern, *Tips for Appellate Advocates, in* APPELLATE PRACTICE MANUAL, *supra* note 4, at 111, 118.

25. The case was *Bennis v. Michigan*, No. 94-8729:

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 94-8729, Tina Bennis v. Michigan. [Y]ou may proceed.

COUNSEL: Mr. Chief Justice, and may it please the Court:

On an October evening in 1988, petitioner's husband, John Bennis, was arrested for having illicit sex with a prostitute in one of the Bennis family automobiles, and Detroit police seized the automobile. Both Tina Bennis' interest in the vehicle and her husband's interest were declared forfeit under a Michigan nuisance abatement statute. The Michigan Supreme Court rejected petitioner's claim that the Due Process and Takings Clauses protected her, an innocent owner, from forfeiture.

QUESTION: [W]ill you tell us what the record shows was the nature of the ownership in the automobile in question?

COUNSEL: The record shows that the vehicle was co-owned. That is, it was co-titled—

QUESTION: What kind of ownership under State law, joint with right of survivorship, co-tenants, what was it?

COUNSEL: Your Honor, I—

QUESTION: Do we know?

COUNSEL: It's a heavily regulated area and I attempted to ascertain which common law joint property interest this most closely resembled. I found nothing definitive on that, but I believe—

QUESTION: You can't tell us?

COUNSEL: I believe it's close to a tenant in common.

QUESTION: How was the automobile titled?

COUNSEL: The automobile was titled in their name, but there's no—

QUESTION: In both names—

COUNSEL: Yes.

QUESTION: —or one name?

COUNSEL: In both names.

QUESTION: In Michigan law, can one co-owner dispose of good title to the automobile?

COUNSEL: I believe that that is true, Your Honor, that—not for the entire automobile. One co-owner—

QUESTION: The entire automobile?

COUNSEL: No. I believe that both—

QUESTION: Could one owner dispose of it?

COUNSEL: I do not believe so, Justice O'Connor.

QUESTION: But you can't give us any citations or anything like that, or any place in the record where we could ascertain the nature of the ownership?

COUNSEL: I'm sorry, I cannot, Your Honor, but—

QUESTION: Well, it makes it very difficult, doesn't it, to decide this case when we don't know the nature of the ownership or what rights a single co-owner would have?

COUNSEL: Well, I think it—I'm quite certain that the sole co-owner does not have the right to sell the entire vehicle. That much I'm certain of, that both signatures would be required to dispose of the—

QUESTION: You can't give us a case or a statute or anything of that sort?

COUNSEL: I cannot.

The full transcript of the oral argument is available at 1995 WL 712350. The court's decision is reported at 116 S. Ct. 994 (1996).

situation, Aldisert recommends admitting you don't know and asking the court for permission to file a supplemental paper with the answer.[26]

Senior Judge Roger J. Miner of the Second Circuit Court of Appeals would add to this list:[27]

- Don't answer a question with a question.[28]
- Don't respond by citing to pages in the record or to the briefs.[29]

Sometimes, a judge will persist with a series of questions that does not seem relevant. Disengaging and returning to your central points can be tough. Aldisert recommends saying, "If the court please, I have two responses to make to that question."[30] Give a direct answer to the question as your first response, then before the judge can fire off a follow-up, say, "For my second response, I would add . . ." and find a link to rush back to your main point. If the judge persists in asking irrelevant questions, Aldisert advises a neutral response: "[I]n my view of the case we have not stressed that particular point, and this is why we have not . . . ."[31]

If one of the appellate panel members won't let you escape from the rabbit trail, Judge Gerald Tjoflat of the Eleventh Circuit Court of Appeals recommends verbal judo: answering the judge's irrelevant questions, then asking the panel for additional time so you can touch on your main points. Judge Tjoflat's "experience is that the court, being sensitive to [the lawyer's] problem, will grant his request."[32]

If you're the respondent or appellee, you should listen closely to the questions fired at your opponent. If the court seems to agree with your position, you're frequently better off saying nothing. But if the judges appear confused or mistaken on a point, or they haven't disclosed a solid view, you can say,

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26. Aldisert, *supra* note 15, at 330; *see also* Myron H. Bright, *How to Succeed on Appeal: A View from the Bench*, TRIAL, Nov. 1991, at 67, 69.

27. Roger J. Miner, *The Don'ts of Oral Argument*, *in* APPELLATE PRACTICE MANUAL, *supra* note 4, at 263, 265.

28. *Id.*

29. *Id.*

30. Aldisert, *supra* note 15, at 333.

31. *Id.*

32. Aldisert, *supra* note 15, at 337 (quoting Judge Tjoflat).

"I heard the court to have concerns about . . . Let me respond briefly."

The tone in which you respond is almost as important as the answer itself. Above all, strive to avoid being overly combative, and don't use overstatement. Judges don't have to sit long on the bench before they weary of overstatement and excessive combativeness. Engaging in such tactics only damages your credibility.[33]

Credibility is an appellate lawyer's stock in trade. It takes time to establish your credibility with the courts. You can't afford to lose it. Law professor and litigation guru James McElhaney confirms something we lawyers always suspected: When the "judge club" gets together, the members compare notes about the lawyers who practice before that court. "Even in a big city, the judge club is a small one," he says. "It makes a difference how you talk to the judge."[34]

They hear, they see, they remember, and they discuss. That club may be a lawyer's toughest audience.

33. Bryan A. Garner, *The Language of Appellate Advocacy*, LITIGATION, Summer 1989, at 39, 40.

34. JAMES W. MCELHANEY, LITIGATION 283 (1995).